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SUPREME COURT, U.S.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1947

**No.**

EMPRESA SIDERURGICA, S.A., a corporation of Colombia, South America, and VANDERBURGH & Co., INC., a California corporation,

*Appellants,*

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,

*Appellees.*

**Appeal from the Supreme Court of the State of California.**

## BRIEF OF APPELLANTS IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION.

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## BRIEF OF APPELLANTS IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION.

The appellees have filed a statement opposing the jurisdiction of this Court upon the ground that the federal question involved is unsubstantial.

## THE FEDERAL QUESTION INVOLVED IS SUBSTANTIAL.

As to the point that the federal question involved is not substantial, we are more than satisfied to stand on our statement as to jurisdiction.

However, it may be pointed out:

(1) That the seriousness of the federal question involved and the grave doubt as to the correctness of the decision of the Supreme Court of California are demonstrated by:

(a) The fact that the Superior Court reached the conclusion that the tax was one upon an export and hence prohibited by the Federal Constitution.

(b) The fact that the Supreme Court of California held that there must be delivery to a common carrier before an article becomes an export.

(c) The fact that the Supreme Court of California held that although part of the cement plant had been shipped and was clearly an export, the remaining part of the plant was not an export.

A liberal construction has been accorded by this Court where it is found from the circumstances that export trade has been actually intended and carried through, and in such cases primary consideration is given matters of substance and not of form.

On page 4 of its objections, appellees say:

"The Supreme Court of California recognized in its opinion that exportation may commence by means

other than delivery to a common carrier for transportation."

But when a review is made of the stipulated facts in this case we find that this principle is completely disregarded.

A summary of the facts reveals that a non-severable contract was entered into by the domestic seller and the foreign purchaser for the sale of the entire cement plant, an export license was issued permitting the export of the entire cement plant, the foreign purchaser paid for the entire cement plant and upon payment title passed to it; coincidentally with the passage of title, the entire cement plant was delivered to an export forwarding agent and a contractor which immediately began to dismantle, package, and ship the entire cement plant; and that the dismantling, packaging and shipping continued as an integrated operation without cessation from the time of the passage of title in January of 1945 until the entire cement plant was completely exported.

Yet the Supreme Court of California held that 14% of the cement plant which had been delivered to the railroad common carrier on March 5, 1945 (the tax day), was clearly an export, but the balance which was committed to exportation and was in the process of being so exported was not an export.

It is without question that this decision of the Supreme Court of California is contrary to the decisions of this Court in holding that only by delivery to a common carrier may an article become an export.

The decisions of this Court consistently hold:

"The means of shipment are unimportant so long as the certainty of the foreign destination is plain."

*Richfield Oil Corp. v. State Board*, 329 U.S. 69, 83.

"The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."

*Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70.

"For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance, not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected."

*Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 662-663.

Prior to reversal by this Court in the *Richfield* case, supra, the Supreme Court of California held that delivery to a common carrier was necessary before an article became an export. In that case the foreign purchaser furnished its own vessel to effect exportation.

In this case, we are again met with the same theory; that before the cement plant may become an export, it must be delivered to a common carrier.

This decision of the Supreme Court of California is in direct conflict with the decision of this Court in the *Richfield* case, supra, and will necessarily affect all exports, not only from California ports, but from all of the states.

Dated, Oakland, California,
September 22, 1948.

Respectfully submitted,
SCOTT D. KELLOGG,
*Attorney for Appellants.*